

No. 86-679

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Supreme Court, U.S.  
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IN THE  
SUPREME COURT  
OF THE  
UNITED STATES  
OCTOBER TERM, 1986

BOOTH NEWSPAPERS, INC.  
*Petitioner*

v

MIDLAND CIRCUIT JUDGE,  
DOW CHEMICAL COMPANY,  
CONSUMERS POWER COMPANY,  
BECHTEL POWER CORPORATION  
AND BECHTEL ASSOCIATES  
*Respondents*

ON WRIT OF CERTIORARI TO THE COURT  
OF APPEALS FOR THE STATE OF MICHIGAN

BRIEF OF RESPONDENT CONSUMERS POWER  
COMPANY IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI

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**QUESTION PRESENTED FOR REVIEW**

Do non-parties have a constitutional right to obtain pre-trial discovery documents in civil litigation, when the documents have not been introduced into evidence at trial or submitted to the judge?

**PARENTS, SUBSIDIARIES, AND AFFILIATES  
OF RESPONDENT CONSUMERS POWER COMPANY**

- CMS Cogeneration Company
- CMS Engineering Company
- Conar Corporation
- Huron Hydrocarbons, Inc.
- Michigan Gas Storage Company
- Northern Michigan Exploration Company
- Plateau Resources Limited
- Canyon Homesteads, Inc.
- Selective Collection Services, Inc.
- Utility Systems, Inc.

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## STATEMENT OF THE CASE

The underlying lawsuit between The Dow Chemical Company ("Dow") and Consumers Power Company ("Consumers") involves claims arising out of a contract dispute concerning the construction of the Midland Nuclear Plant. At the joint request of the parties on October 20, 1983, December 20, 1983 and April 6, 1984, the Midland County Circuit Court entered standard protective orders to maintain the confidentiality of documents produced in discovery containing sensitive commercial information. On July 16, 1984 the circuit court entered a protective order sealing all deposition transcripts in the case.

On July 20, 1984, petitioner Booth Newspapers, Inc., along with the Midland Publishing Co. and Michigan Press Association, filed a motion to intervene and a motion to vacate the four protective orders. The circuit court denied the motions on August 8, 1984. Although the court based its decision on procedural grounds, the court noted that *none* of the discovery materials in question were available even to the court itself (including the deposition transcripts stored in the courthouse), so they remained entirely private. Petition at B-2, fn 1.

On August 13, 1984 Petitioner filed a complaint for superintending control in the Michigan Court of Appeals, seeking reversal of the protective orders and the order denying intervention. The parties to the underlying lawsuit, Dow and Consumers did *not* appeal and did not ask the court of appeals to vacate or modify the protective orders.

Then on August 31, 1984 the circuit court entered a fifth protective order, prohibiting the parties from using any information obtained in discovery for any purpose other than trying this case. Petitioner asked the court of appeals to review this fifth protective order in its appeal as well.

Shortly after the petitioner filed its complaint in the court of appeals, trial began in the underlying lawsuit in the Midland Circuit Court, on October 12, 1984. The trial was completely open to the press and public and petitioner reported extensively on the evidence coming out at trial.

On September 3, 1985 (after the trial had been in progress for almost a year), the Michigan Court of Appeals dismissed the complaint for superintending control and affirmed all the circuit court orders. The court of appeals ruled that (1) petitioner had no standing to complain of the orders preventing the parties from releasing documents obtained in discovery; (2) even if stored in the courthouse, deposition transcripts and discovery materials are not public records, so outsiders do not have a right of access; and (3) intervention was correctly denied under the court rules. The court of appeals did not find any procedural irregularity or abuse of discretion in the entry of the protective orders.

Petitioner then filed an application for leave to appeal with the Michigan Supreme Court. The Michigan Supreme Court denied the application on April 28, 1986, and, subsequently, denied petitioner's motion for reconsideration.

Petitioner suggests that the protective orders were entered without giving the parties any opportunity to be heard, and without any consideration whether there was good cause for their issuance. Petition at 5-9, 13. The parties stipulated to the entry of the first three protective orders, yet there was also an extensive hearing on January 13, 1984 on the scope of these orders. The court explicitly found good cause, stating that the confidentiality orders in this complex case would have a salutary effect in expediting full and forthright discovery, by not exposing the parties to attack by outsiders trying to use the documents in other forums. Transcript 1/13/84, pp. 28, 59 (Appendix A).

Similarly, as to the fourth protective order, the parties were given an opportunity to be heard in open court regarding the subject of sealing the deposition transcripts at the pretrial conference of April 30, 1984. At that time the judge ruled that depositions are not public proceedings and advised that he had instructed court personnel that the transcripts were "to remain sealed *until such time as they are offered in evidence or used at trial, at which time they would be unsealed.*" (Emphasis supplied) Transcript, 4/30/84, p. 5 (Appendix B). Both parties expressly agreed with the Court's ruling that the deposition transcripts should be sealed and the depositions should remain private. *Id.* Thus, the fourth protective order, issued July 17, 1984, just repeated in written form the court's prior ruling on the record, to which no one had objected. Indeed, the order sealing the deposition transcripts merely formalized the longstanding practice of the Midland County Circuit Court in *all* cases, which was to keep depositions sealed until used at trial. See Affidavit of James R. Rood (Appendix C) and Petition at B-2, n. 1.

Similarly, the fifth protective order merely formalized the court's prior rulings from the bench. The merits of the order had already been addressed on the record by the parties and the court. On several occasions the court had deplored the prospect of leaking discovery documents to the media and using the lawsuit in a public relations campaign; the court repeatedly reminded the parties the discovery process was intended for trial preparation only and admonished them not to use discovery for other purposes outside the courtroom. Transcript, 4/30/84, pp. 25-26 (Appendix D).<sup>1</sup> Thus the entry

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<sup>1</sup> In a May 24, 1984 letter to the parties the court again explained the "good cause" for sealing the depositions and prohibiting dissemination of discovery documents:

I felt that leaking, directly publicizing, or use of information obtained by the discovery process in this cause, in other pending matters, was a misuse of the discovery proceedings. . . . It is of extreme impor-

Footnote 1 continued on page 4

of the fifth order on August 31, 1984 again was merely a recapitulation of the court's previous instructions to the parties, so it needed no new, separate hearing or finding of good cause.

As noted above, the underlying trial began on October 12, 1984, and continued (with periodic breaks) until it was recessed on September 17, 1986 so Dow and Consumers could put the final touches on a business arrangement settling the lawsuit. All court proceedings have been completely open, and assiduously covered by the press. All the facts about the nuclear plant were brought out at trial, which generated over 26,000 pages of transcript and several thousand exhibits. The press and public have had absolute access to all testimony, documents, and deposition transcripts introduced into evidence — including those which had been previously made confidential by the protective orders. Once put in evidence, the parties routinely provided copies of documents or exhibits to the press (including petitioner) if they expressed any interest.

The protective orders at issue did not limit the media's right to interview any deposition witnesses, or to ask a party or witness to inspect and copy its documents which it produced in discovery. None of the circuit court orders placed any restraint on the press to publish whatever it wanted. Finally, none of the orders in any way restricted access to evidence introduced at trial.

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Footnote 1 continued from page 3

tance to the expeditious handling of this litigation that all parties feel free to cooperate fully with the court in disclosing to other litigants all relevant facts and documents relating to this proceeding. The fear of unauthorized use of discovered material will certainly chill voluntary production of information. I urge all parties to use information obtained by the discovery process *only* for trial preparation.

Appendix E.

## SUMMARY OF ARGUMENT

In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), this Court flatly stated that discovery is not and never has been open to the public: "pretrial depositions and interrogatories are not public components of a civil trial." 467 U.S. at 33. Accordingly, the public has no right of access to discovery — indeed, even "a litigant has no First Amendment right of access to information made available for purposes of trying his suit." 467 U.S. at 32. Consistent with this Court's pronouncements in *Seattle Times*, no federal court has held that the press or public has a constitutional right of access to pretrial discovery in civil cases.

Realizing that there is no serious question for certiorari, petitioner seeks to obscure the orders actually issued by the circuit court. So, in order to raise an issue that might warrant this Court's attention, petitioner misleadingly suggests that this case involves a denial of access to *trial* documents. But the circuit court orders only denied public access to raw discovery materials not yet placed before the court for its consideration; the circuit court ordered that as soon as the materials were presented at trial or on motion, they became public. The issue of suppressing trial evidence is purely hypothetical and is not presented by the facts of this case.

## ARGUMENT

### I. THE ISSUE IS ACCESS TO RAW DISCOVERY MATERIALS; THE PRESS AND PUBLIC WERE NOT DENIED ACCESS TO TRIAL EVIDENCE

To the extent the Petition is based on the protective orders actually entered in this case, there is no issue worthy of this Court's attention; indeed, there is absolutely no authority for overturning the orders. To the extent that the

Petition does raise a legal issue arguably worthy of this Court's attention, that issue is not presented by the protective orders in this case.

Recognizing that there is no authority to support a right of access to pretrial discovery materials not put in evidence, petitioner falsely implies that the circuit court orders barred access to evidence introduced at the trial itself. Petitioner begins by saying the issue is a denial of "access to evidence admitted at a civil trial, . . ." Petition at 3. Petitioner declares the case concerns "Protective Orders that Suppress Trial Documents . . .," Petition at 10, and petitioner's entire argument is framed in terms of an alleged denial of "access to trial documents," Petition at 18. *However, none of the circuit court orders in any way restricted public access to trial evidence or exhibits.* On the contrary, each of the confidentiality orders expressly allows for the disclosure of any discovered materials once they are made part of the public record at trial or in a motion or brief. Petition ¶3 on C3, ¶3 on D3, ¶6 on E4, and G1. See also Appendix B. By their own terms, the orders do not apply to trial evidence.

In fact, with one minor exception, the circuit court *never* ordered that any trial evidence be sealed or suppressed.<sup>2</sup> Nor did the court ever deny any request by the press or public to inspect documents admitted at trial. Once in evidence, the parties, with the circuit court's blessing, treated formerly confidential documents as in the public domain, routinely allowing the press (including petitioner) to copy or inspect any documents of interest. Petitioner never was denied access to trial testimony or exhibits.

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<sup>2</sup> Approximately one hour of testimony of one witness was received *in camera* so that the court could determine the validity of a non-party's claim that its business documents contained trade secrets. The court ruled that no trade secrets were evident and the documents were thereafter received in evidence without any restriction. The media thereafter published a number of these documents.

At one point petitioner acknowledges that none of the protective orders at issue here extend to matters admitted at trial, quoting the court of appeals. Petition at 20, n. 5. But petitioner suggests the court of appeals extended the "life" of the orders, thereby sealing trial evidence from public view. *Id.* In fact, the court of appeals did *not* modify the circuit court orders but merely affirmed them and dismissed petitioner's complaint.

In *obiter dicta* the court of appeals did remark that until a case is over there is no right of physical access to trial exhibits and evidence in the possession of the judge (although there would be access during the trial to the extent the court clerk has possession). Petition at A-6. Of course, this issue is not in any way presented in this case, since none of the circuit court orders said anything about limiting access to trial exhibits and the circuit court never issued any order sealing trial exhibits or preventing public access to the trial record. So, while a right of access to trial exhibits during the pendency of a case might make for an interesting issue, any consideration of it in this case would be purely advisory and hypothetical.

As part of this strategem to get the Court's attention, petitioner falsely insinuates the "a blanket of secrecy" has been placed over this case, Petition at 23, and "the documents which might have explained this debacle were all hidden from public view." Petition at 17-18. Members of the press and public attended every day of trial and the trial was covered extensively in the newspapers. The public evidence comprised hundreds of volumes of testimony and exhibits concerning the Midland nuclear plant. Further, to the extent any previously sealed documents or depositions were presented in the courtroom or used in evidence, they became a matter of public record and the media of course had complete freedom to report on them. Moreover, the press routinely was given full access to any trial exhibits of interest.

simply by asking the parties or their trial counsel. In a significant sense, the Petition is moot now that all the evidence has come out at trial.

## II. THIS COURT'S DECISIONS REFUTE THE ASSERTION OF A CONSTITUTIONAL RIGHT OF ACCESS TO PRE-TRIAL DISCOVERY

Petitioner first argues that this Court's decisions in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), and *Press Enterprise Co. v. Superior Court of California (Press-Enterprise II)*, 478 U.S. \_\_\_, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986), establish a qualified First Amendment right of public access to discovery in civil litigation. Petition at 10-21.

Petitioner has perversely misread the *Seattle Times* decision. *Seattle Times* in fact conclusively establishes that there is *no* First Amendment right of access to civil pretrial discovery. In *Seattle Times*, this Court unequivocally held that:

*A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. . . . Moreover, pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice. . . . Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction in a traditionally public source of information.*

467 U.S. at 32-33 (citations omitted; emphasis supplied).

If a litigant has no First Amendment right of access to information made available in discovery, a non-litigant certainly has no First Amendment right of access to such information.

If discovery is not open to the public, there certainly is no public right of access. In short, this Court's emphatic pronouncements in *Seattle Times* flatly contradict petitioner's argument.<sup>3</sup>

*Seattle Times* did hold that a litigant's First Amendment right to speak is implicated by a protective order restricting his dissemination of information obtained in discovery. 467 U.S. at 34. The order on appeal prohibited the *Seattle Times* newspaper, a party to the lawsuit, from publishing the information it had obtained through pretrial discovery. This Court declared that no constitutional rights are implicated by denying the press access to discovery, but the First Amendment is involved when a party is prevented from disseminating information it already had access to by virtue of discovery. 467 U.S. at 32.<sup>4</sup> On the issue of a litigant's right to speak and publish, the court found the First Amendment did apply, although "to a far lesser extent" than in other contexts. 467 U.S. at 34.<sup>5</sup>

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<sup>3</sup> Also in *Seattle Times*, 467 U.S. 20 at 33, this Court cited the following with approval:

Similarly, during the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than *wholly private to the litigants*. A pretrial deposition does not become part of a "trial" until and unless the contents of the deposition are offered in evidence.

*Gannett Corp. v. DePasquale*, 443 U.S. 368, 396, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (Burger, C.J., concurring) (emphasis supplied).

<sup>4</sup> See *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1331 (D.C. Cir. 1985) ("[*Seattle Times*] did not involve a claim by the public to *access*, but rather a claim by one of the parties of the right to *disseminate* information acquired in the course of pretrial discovery").

<sup>5</sup> The Court held that if supported by ordinary "good cause," confidentiality orders restricting a party's right to speak will be approved since the constitution requires nothing more. 467 U.S. at 37. Further, "[i]t is sufficient . . . that the highest court in the state found no abuse of discretion in the trial court's decision to issue a protective order." *Id.*

In sum, *Seattle Times* declared there is no constitutional or common law right of access to discovery, but a party does have an attenuated constitutional right to publish information once obtained in discovery.

Petitioner only asserts a right of access, since none of the orders restricted its freedom to publish. Thus, according to *Seattle Times*, the First Amendment is inapplicable. This Court clearly did not suggest that outsiders to the litigation would have any right to obtain a hearing or review as to discovery orders which did not restrict their freedom of speech. Petitioner of course cannot assert the free speech rights of the parties bound by the court's confidentiality orders. The parties have not appealed the orders restricting their freedom of speech, so even the minimal First Amendment scrutiny of *Seattle Times* is not warranted here.

Petitioner next argues that *Press-Enterprise II* extended the First Amendment right of access so as to necessarily include civil discovery. Petition at 13-17. The holding of *Press-Enterprise II* was simply that a qualified First Amendment right of access attached to certain *courtroom* proceedings in a *criminal* trial (i.e., a preliminary evidentiary hearing to determine whether there was probable cause to bind the accused over for trial). The magistrate had closed the courtroom during the *41 day* hearing, and sealed the transcript record. This Court noted that "the preliminary hearing functions much like a full scale trial." 92 L.Ed.2d at 9. Obviously, the instant case is completely different: this is a civil, not a criminal, case, and there was no denial of access to any evidence presented to the judge or to any court proceedings.

Nor does the two-prong analysis in *Press-Enterprise II* yield petitioner's conclusion that there is a public right of access to the raw fruits of discovery in a civil case. According to *Press-Enterprise II*, the first test for determining whether a First Amendment right of access attaches is

whether “there has been a tradition of accessibility,” 92 L.Ed.2d at 11, that is, “whether the place and the process has historically been open to the press and general public,” 92 L.Ed.2d at 10. *Seattle Times* conclusively answered this question in the *negative* with regard to civil discovery. *Seattle Times*, 467 U.S. at 33 (discovery was “not open to the public at common law” and it is not a “traditionally public source of information”). It is absolutely clear that historically civil discovery has never been open to the press and public, nor is it open as a matter of contemporary practice. *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1338 (D.C. Cir. 1985) (“[i]t can thus hardly be said that there was a tradition, or is even now a general practice, of public access to pretrial depositions”); *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986).<sup>6</sup> Recognizing this, petitioner does not even attempt to argue that this first step in the right of access analysis could be satisfied as to civil discovery.<sup>7</sup>

The second factor in determining whether a First Amendment right attaches is “whether public access plays a significant positive role in the functioning of the particular process in question”. 92 L.Ed.2d at 10. Noting that “there are some kinds of government operations that would be totally frustrated if conducted openly,” 92 L.Ed.2d at 10, the

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<sup>6</sup> Indeed, in 1985 the Michigan Supreme Court adopted a court rule which *prohibits* discovery materials or depositions from being publicly used with Michigan courts, except in connection with a motion or trial. MCR 2.302(h)(1) (Appendix F). Similar rules currently obtain in numerous state and federal courts across the country.

<sup>7</sup> Instead, petitioner asserts that the second factor (which petitioner calls the “structural factor”) was “particularly decisive” in *Press-Enterprise II*, Petition at 14, and that this Court placed “overwhelming reliance on the ‘structural factor’” Petition at 16. Petitioner ends up referring simply to “[t]he ‘structural factor’ analysis adopted by *Press Enterprise II*.” Petition at 17. In other words, the first, historical, factor disappears altogether in petitioner’s reading. Petition at 9-10.

court in *Press-Enterprise II* found a right of access because public access to criminal trials plays "a particularly significant role in the actual functioning of the process," and "preliminary hearings are sufficiently like a trial to justify the same conclusion," 92 L.Ed.2d at 12.

Obviously, this reasoning does not apply to the exchange of information in civil discovery, which plainly is not in any way analogous to a criminal trial. The only functional justifications for a right of access accepted by this Court have focused on judicial decision-making in criminal cases — fostering the integrity of fact-finding and the appearance of fairness, checking judicial abuses, and providing a cathartic opportunity for the community to observe justice being done. *In Re Reporters Committee*, 773 F.2d at 1336-7. Even assuming these functions are as important in private civil litigation, they are *entirely* irrelevant to pretrial discovery which is conducted by the litigants and third parties without any judicial involvement and where no judicial decision-making takes place.<sup>8</sup>

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<sup>8</sup> But of course, unless and until introduced into evidence, the raw fruits of discovery are not in the possession of a court. If the purpose of the common law right of access is to check judicial abuses, . . . then that right should only extend to materials upon which a judicial decision is based.

*Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 n.7 (2nd Cir. 1981).

The same factors that support a right of access to judicial records and other public documents — the public's right to know and the public interest in insuring that judicial proceedings are conducted fairly, to name but two — simply are not implicated where the materials were obtained by a party through discovery but have not yet been filed with the court.

*In re Agent Orange Product Liability Litigation*, 96 F.R.D. 582, 584 (E.D. N.Y. 1983).

Since as a matter of fact there never has been any public access to civil discovery, by definition such access cannot perform "a particularly significant positive role in the actual functioning of the process." It is *privacy* which plays the central role in the functioning of the discovery process. Especially in complex cases, confidentiality promotes swift and forthright discovery, and avoids wasteful discovery disputes. Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1 (1983). In the judgment of every court that has considered the matter, public access would hamper, if not destroy, the expeditious functioning of the discovery process.

Discovery, whether civil or criminal, is essentially a private process . . . .

If it were otherwise and discovery information and discovery orders were readily available to the public and the press, the consequences to the smooth functioning of the discovery process would be severe.

*United States v. Anderson*, 799 F.2d at 1441.<sup>9</sup>

As this Court declared, "[l]iberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes." *Seattle Times*, 467 U.S. at 34 (emphasis supplied). In other words, this Court has recognized that civil discovery does not serve any purposes similar to criminal trials which require public participation. Civil discovery is a device to help resolve private claims, not to generate information for public consumption. The purpose of discovery "would be totally frustrated if conducted openly."

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<sup>9</sup> *Anderson* held that there is no First Amendment right of access to a bill of particulars and notice of similar acts evidence filed by the government as part of court-ordered discovery in a *criminal* case, and therefore neither the press nor public was entitled to a hearing before these materials were sealed.

In sum, the two step analysis of *Press-Enterprise II* lends absolutely no support to petitioner's claimed right of access to discovery in private civil litigation.

### III. NO DECISION OF ANY FEDERAL CIRCUIT SUPPORTS THE PETITION

Petitioner's second argument is that the decision of the Michigan Court of Appeals is in conflict with decisions of the Sixth and Seventh Circuits of the federal Court of Appeals. Here, petitioner prefers to ignore the actual facts of the case and switches to a hypothetical case involving an order limiting access to trial exhibits.

Notably, petitioner does not claim that the circuit court orders themselves are inconsistent with a decision of any federal court of appeals, since these orders only restricted access to pretrial discovery. Instead, petitioner hitches its argument to the gratuitous comment in the Michigan Court of Appeals decision suggesting that a trial judge *could* lawfully restrict access to trial exhibits or evidentiary materials in his personal possession — *but the trial judge in this case never did this*. The actual *holding* of the Michigan Court of Appeals was that there was no error in the trial court's orders regarding the confidentiality of *discovery materials*. Its decision was simply to affirm. Neither the court of appeals decision to affirm nor the protective orders themselves conflict with any federal court of appeals case.

Petitioner relies on two cases, *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165 (6th Cir. 1983), and *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984). Petitioner acknowledges that *at most* these cases adumbrate a constitutional right of access to "materials admitted into evidence." Petition at 24. This gives the game away.

*Brown & Williamson* concerned evidentiary materials submitted to the court and did not even tangentially express any view as to a right of access to documents exchanged in discovery and not part of the court record. The court thus observed "the public has a strong interest in obtaining the information contained in *the court record*." 710 F.2d at 1180 (emphasis supplied). The Sixth Circuit's decision did not concern a seal on pretrial discovery materials, but a seal on the entire administrative record which was on appeal.

Since *Brown*, the Sixth Circuit decided *United States v. Beckham*, 789 F.2d 401 (6th Cir. 1986), which squarely refutes the notion that it would consider the discovery orders in this case as implicating any constitutional rights. In *Beckham*, the court held that as long as the media and public were not excluded from the courtroom during trial and there were no restrictions on their freedom to publish, there was no *constitutional* right of access to tape recordings, transcripts of the recordings, or documentary exhibits introduced in a criminal trial. *Id.* at 407, 409. (The court did hold that in a criminal case there was a qualified common law right of access to copy materials admitted into evidence.) *A fortiori*, since there is no First Amendment right of access to *trial exhibits* in a *criminal* case, there is no First Amendment right of access to discovery materials not admitted into evidence in a civil case.

In the other case relied on by petitioner, *Continental Illinois Securities Litigation*, the Seventh Circuit held that a conditional right of access attaches to hearings held and evidence presented on a dispositive pretrial motion in a civil case. The court explicitly founded this right of access on the fact that the documents to which the press sought access had been *admitted into evidence and relied on by the court in its decision*. *Id.* at 1304. The Seventh Circuit has since explained that no right of access would be involved in a protective order covering information produced in discovery.

In *Ball Memorial Hospital v. Mutual Hospital Insurance*, 784 F.2d 1325, 1346 n. 2 (7th Cir. 1986) the court declared that medical price data were properly subject to confidentiality orders because: "The data were not introduced into evidence, and therefore the presumption that evidentiary matters will be available to the public does not apply."

In short, no federal court of appeals holds that non-parties have a First Amendment right of access to documents produced in discovery and not introduced into evidence or presented to the court for a decision. On the other hand, a multitude of decisions hold that *at least* until introduced into evidence at trial, there is absolutely no constitutional right of access to discovery documents or depositions.

Most significantly, in a comprehensive recent opinion authored by Judge (now Justice) Scalia, the Court of Appeals for the District of Columbia unanimously held that there was no constitutional right of access to discovery documents or depositions in a civil case, even if they are filed with and used by the court in a summary judgment hearing.<sup>10</sup> The court said:

We are certainly unaware of any tradition of public access (pre- or post-judgment) to all documents consulted (or, as appellants would have it, consultable) by a court in ruling on pre-trial motions. . . . *[M]aterial placed before the court in connection with summary judgment motions is not constitutionally required to be open to the public . . .*

\* \* \*

We therefore find that until May 2, 1983 and May 20, 1983, [when judgment was entered] respectively, the Dis-

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<sup>10</sup> Judge Skelly Wright agreed there was no right of access to pretrial materials not admitted into evidence, but he dissented from the majority's further holding that before judgment there was no right of access to exhibits admitted into evidence at trial. *Id.* at 1341, 1347.

strict Court could, without violating the First Amendment to the Constitution, refuse the reporters access to the materials at issue in the two cases. *The reporters thus had no First Amendment entitlement to a document-by-document determination of the need for confidentiality prior to those dates.*

*In Re Reporters Committee*, 773 F.2d at 1338-1339 (emphasis supplied).

As the court declared in *Cippollone v. Liggett Group*, 785 F.2d 1108, 1119 (3rd Cir. 1986): "*the first amendment is simply irrelevant to protective orders*" (emphasis supplied). Other recent cases are in complete agreement: there is no constitutional basis for the press or public to challenge confidentiality orders during discovery. E.g., *Houston Chronicle Publishing Co. v. Hardy*, 678 S.W.2d 495, 10 Med.L.Rptr. 1841, 1843 (Tex. Civ. App. 1984) ("counsel cites not a single case, state or federal, which holds directly that raw pretrial depositions, taken in a civil case, which have never been offered in evidence upon a future trial is subject to access, as a matter of right"); *Oklahoma Hospital Ass'n v. Oklahoma Publishing Co.*, 748 F.2d 1421 (10th Cir. 1984); *In re Alexander Grant & Co. Litigation*, 629 F.Supp. 593 (S.D. Fla. 1986).

#### IV. THERE ARE OTHER GROUNDS FOR AFFIRMANCE

Finally, even if there were an arguable First Amendment issue presented by this case, there are several independent grounds for affirming the circuit court orders. As the court of appeals noted there were three other issues:

(2) Whether the trial court abused its discretion in the issuance of the protective orders; (3) whether the trial court erred in its denial of intervention by the plaintiffs; and (4) whether superintending control is the appropriate remedy for plaintiffs to seek in this case.

Petition at A-2.

In the interest of brevity, these will not be detailed here. Suffice to say that these provide substantial alternative grounds for the dismissal of petitioner's complaint and further compelling reasons why it would be improvident to grant certiorari in this case.

### CONCLUSION

The arguments and authorities in the Petition would only be relevant if the circuit court had denied access to trial evidence or exhibits, and the petitioner had filed a challenge to such orders. Then there might be a genuine controversy worthy of this Court's attention. But that is not the case here. The circuit court's orders only applied to discovery documents until such time as they were used at trial. The press and public had full access to all trial testimony and exhibits.

A constitutional right of access to pretrial discovery would create an unprecedented invasion of outside parties into the discovery process. No federal court has ever approved such a right of access. The Petition should be denied.

Respectfully submitted,

BARRIS, SOTT, DENN & DRIKER

By: EUGENE DRIKER (P12959), *Counsel of Record*  
MORLEY WITUS (P30895)

211 West Fort Street, 15th Floor

Detroit, MI 48226

(313) 965-9725

*Attorneys for Consumers Power Co.*

DATE: November 21, 1986

APPENDIX A

STATE OF MICHIGAN  
IN THE CIRCUIT COURT  
FOR THE COUNTY OF MIDLAND

THE DOW CHEMICAL COMPANY,  
*Plaintiff,*

vs.

File No. 83-002232-CK-D

CONSUMERS POWER COMPANY,  
*Defendant.*

MOTION OF BECHTEL POWER CORPORATION  
AND BECHTEL ASSOCIATES PROFESSIONAL  
CORPORATION FOR ENTRY OF CONFIDENTIALITY  
PROTECTIVE ORDER RE BECHTEL DOCUMENTS  
AND IN RESPONSE AND OPPOSITION  
TO DOW'S MOTION TO COMPEL  
MOTION OF DOW CHEMICAL  
TO COMPEL BECHTEL TO  
PRODUCE AND COPY DOCUMENTS

Proceedings had in the above-entitled cause before the  
Honorable David Scott DeWitt, Circuit Court Judge, at the  
Midland County Courthouse, Midland, Michigan, on Friday,  
January 13, 1984.

APPEARANCES:

KIRKLAND & ELLIS

BY: SAMUEL A. HAUBOLD, ESQ.,  
HERBERT H. EDWARDS, ESQ.,  
*Appearing on behalf of the Plaintiff.*

BARRIS, SOTT, DENN & DRIKER

BY: EUGENE DRIKER, ESQ., and  
SHARON M. WOODS, ESQ.,  
*Appearing on behalf of the Defendant.*

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## Appendix A

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\* \* \* are not attempting, or will we at any time, to inject any pro or antinuclear aspects into this case.

THE COURT: I understand that, but what they are worried about is the security of their documents from these people. And there has been a tendency already for various pro or antinuclear people to take great comfort in the suit instituted by The Dow Chemical Company against Consumers Power Company on the assumption that in some way there will be enough fallout from this litigation to be of assistance to them in establishing some sort of environmental impact on the continued construction of the plant. So that's not a dreamed-up concern, I don't think, and I think it is legitimate that we protect the interests of all the litigants with respect to outside struggles that they might have in this just purely private dispute between The Dow Chemical Company and Consumers Power Company.

MR. HAUBOLD: Your Honor, I certainly agree that those are irrelevant issues we should not get involved with in this case. But, by the same token, we should have the right to consult with qualified technical people without the fear that they feel, many of them, there may be retaliation against them if Bechtel or Consumers Power knows that they are somehow aiding Dow in the case. And these — we are not talking \* \* \*

*Appendix A*

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THE COURT: I would think so. You know, both — all parties and non-parties that we have represented in the room are being attacked on all sides by Philistines of every order. We got attorney generals and Ralph Nader and environmentalists. You're all under fire from one direction or another, and I suppose none of you want to make this litigation a field day for people that are — for one reason or another have an ax to grind against your particular organization or your industry or anything. And that's not the purpose of the discovery rules. So I think that you ought to be able to work out something.

MR. HAUBOLD: I think, your Honor, if I might say this, any individual or organization which we might consult are going to be recognized people in the field. The mere fact that Bechtel didn't like their testimony in a particular case or they testified against them is really —

THE COURT: I don't think that's — that wouldn't be the basis of a sustainable objection, as far as I'm concerned. If this particular individual has an interest that — where you could not rely on the material being used in this lawsuit alone, then that would be a legitimate reason for some concern. I am not saying that we might not, after balancing all those \* \* \*



**APPENDIX B**

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT  
FOR THE COUNTY OF MIDLAND**

**THE DOW CHEMICAL COMPANY,**  
*Plaintiff,*

**VS.**

**File No. 83-002232-CK-D**

**CONSUMERS POWER COMPANY,**  
*Defendant.*

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**PRE-TRIAL CONFERENCE #2**

Proceedings had in the above-entitled cause before the Honorable David Scott DeWitt, Circuit Court Judge, at the Midland County Courthouse, Midland, Michigan, on Monday, April 30, 1984.

**APPEARANCES:**

**KIRKLAND & ELLIS**

**BY: WILLIAM R. JENTES, ESQ., and**

**SAMUEL A. HAUBOLD, ESQ.,**

*Appearing on behalf of the Plaintiff.*

**BARRIS, SOTT, DENN & DRIKER**

**BY: EUGENE DRIKER, ESQ., and**

**SHARON M. WOODS, ESQ.,**

*Appearing on behalf of the Defendant.*

*Appendix B*

(5)

\* \* \* it is then appropriate to raise those matters against the written transcript of the document.

That then leads into the second part of the matter and that is what to do with regard to depositions that are already taken and transcribed. So far none of those depositions, to my knowledge, I believe, have yet been filed with the Court.

THE COURT: Yeah, we have some filed. And, as a matter of fact, I've instructed the court personnel to follow the Court Rules, and those depositions are to remain sealed until such time as they are offered in evidence or used at the trial, at which time they would be unsealed.

MR. JENTES: All right. What is your Honor's feelings with regard to the presence of members of the press or third parties at depositions?

THE COURT: Well, in the first place, the depositions are not, unless they're taken de bene esse — but if they're for the purpose of discovery, the area of inquiry is wider than the area of inquiry that would be permitted at the trial, obviously, and they are not part of the proceedings and hence are not open to the public. Therefore, either party to the deposition proceedings can object to any third parties being present other than counsel, the witnesses, or —

*Appendix B*

(6)

counsel for the witnesses, counsel for the parties, counsel for the witness and the witness; and I think upon the objection of any party, then there would be no one else permitted. Of course, if everyone present consented to being — to the press being present, the Court would have no interest in that whatever. But it is — I think I have to protect the rights of the parties to exclude members — exclude anyone that I haven't mentioned from the proceeding.

MR. JENTES: All right. Thank you. I think that will give us some guidelines on that.

THE COURT: Anybody got any problem with that?

MR. DRIKER: That's satisfactory, your Honor.

MR. JENTES: I think the only other area that we discussed with Mr. Driker in advance, and on which we may have some disagreement, I don't know, is with regard to the use of documents that have been produced in the litigation but not subject to a protective order or documents that are obtained through other sources. For example, as your Honor knows, there's a very voluminous public record during the course of the NRC proceedings and are available also through the NRC offices as public documents.

The particular matter that appeared in the \* \* \*



**APPENDIX C**

**AFFIDAVIT**

STATE OF MICHIGAN   )  
COUNTY OF MIDLAND ) ss.

JAMES R. ROOD of 2516 Abbott Road, Apt. U-5, Midland, Michigan, County of Midland, State of Michigan, being first duly sworn, says:

1. That he served as the sole Judge of the 42nd Circuit Court of Midland County from 1968 to 1976.

2. That prior to and during his time on the bench in the Midland County Circuit Court, all discovery deposition transcripts filed by the litigants in civil cases were kept in the same sealed form as received by the Court Clerk's Office.

3. That prior to and during his time on the bench in the Midland County Circuit Court, all discovery deposition transcripts filed by the litigants in civil cases remained sealed until such time as they were offered in evidence or otherwise used to perpetuate testimony at trial or court hearings.

4. That prior to and during his time on the bench in the Midland County Circuit Court, the sealed depositions testimony and accompanying Exhibits filed by the litigants in civil cases were never regarded as part of the record available to the public or to me until such time as they were offered in evidence or otherwise used to perpetuate testimony at trial.

(s) JAMES R. ROOD

*Appendix C*

Subscribed and sworn to before me, a Notary Public,  
this 6th day of September, 1984.

(s) MARLA JEANNE RAHM,  
*Notary*  
County of Midland, Michigan  
My Commission Expires: 11/17/87

**APPENDIX D**

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT  
FOR THE COUNTY OF MIDLAND**

THE DOW CHEMICAL COMPANY,  
*Plaintiff,*

vs.

File No. 83-002232-CK-D

CONSUMERS POWER COMPANY,  
*Defendant.*

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**PRE-TRIAL CONFERENCE #2**

Proceedings had in the above-entitled cause before the Honorable David Scott DeWitt, Circuit Court Judge, at the Midland County Courthouse, Midland, Michigan, on Monday, April 30, 1984.

**APPEARANCES:**

**KIRKLAND & ELLIS**

**BY: WILLIAM R. JENTES, ESQ., and  
SAMUEL A. HAUBOLD, ESQ.,  
*Appearing on behalf of the Plaintiff.***

**BARRIS, SOTT, DENN & DRIKER**

**BY: EUGENE DRIKER, ESQ., and  
SHARON M. WOODS, ESQ.,  
*Appearing on behalf of the Defendant.***

*Appendix D*

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\* \* \* to get this lawsuit tried expeditiously. I can start trying this lawsuit anytime after the 15th of July, and I think that the faster we get the thing tried in the proper forum, which is right here, right in this room, the less time we'll — or, the less concern we'll have for having the matter tried in the press by innuendo, by half truths, by — or any other way. In other words, gossip and rumor will end if we have a forum and a place where we can get to the matters that are actually involved in this lawsuit, and the press can accurately report what happens in a Courtroom.

So with respect to your contention, Mr. Driker, that you don't want to have Dow Chemical Company showing the documents around, we haven't had any situation where they've shown any documents that they've got in this proceeding. I certainly would regard it as an abuse of the discovery proceedings in this Court if documents were shown to parties without some legitimate connection to the preparation of a claim or a defense.

And I think with that kind of advice to all of you right here, I don't think I am going to have to go any further into this, because it's not my intention to try to run this lawsuit by gag rules and withholding things. But we all know — you are all very experienced \* \* \*

*Appendix D*

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and, I'm certain, ethical practitioners, and you all know the purpose of discovery is not for harassment. As a matter of fact, all the discovery rules are conditioned on giving the Court the power to relieve situations where the discovery is used in an harassing fashion.

So I don't think I'm going to have to enter an order, but I certainly am going to indicate to you that, as far as I'm concerned, it would be an abuse of this Court and its process to use the documents produced for discovery for any other purpose than having a legitimate connection with the preparation of a claim or defense. To show somebody a document who was not — where it was not necessary to prepare that person as a possible witness I don't think would be a proper use.

MR. JENTES: Thank you, your Honor. I can assure you that Dow has not done anything in violation of what your Honor says and we will not. And consistent with your desire to sort of move the thing along, I wonder if we might step onto agenda item 2, which Mr. Haubold will handle.

THE COURT: All right.

MR. HAUBOLD: Your Honor, Sam Haubold, with regard to agenda item 2, which is getting to the question of going through the discovery so that we can \* \* \*



APPENDIX E

[Letterhead of Forty-second Judicial Circuit of Michigan]

May 24, 1984

KIRKLAND & ELLIS  
200 East Randolph Street  
Chicago, Illinois 60601

RE: *The Dow Chemical Company v*  
*Consumers Power Company*  
File No. 83-002232-CK-D

Gentlemen:

I have Mr. Jentes' letter of May 3, 1984. Depositions taken pursuant to order of this court and/or pursuant to notice given in this cause are for discovery purposes in *this* case only. Rule 306.6(1) provides that the transcript of such depositions be "securely sealed" and filed in the court. I attempted at the April 30th hearing to impress upon the parties that I regarded depositions hearings as non-public unless all concerned agreed otherwise. I further indicated that I felt that leaking, directly publicizing or use of information obtained by the discovery process in this cause, in other pending matters, was a misuse of the discovery proceedings. I wish to make it clear that the misuse of the discovery process may result in the court restricting its availability to any party or parties who misuse the process.

It is of extreme importance to the expeditious handling of this litigation that all parties feel free to cooperate fully with the court in disclosing to other litigants all relevant facts and documents relating to this proceeding. The fear of unauthorized use of discovered material will certainly chill voluntary production of information. I urge all parties to use

*Appendix E*

information obtained by the discovery process *only* for trial preparation.

Yours very truly,

(s) David Scott DeWitt  
*Circuit Judge*

DSD:mc

ccs: Herbert Edwards

CLARK, KLEIN & BEAUMONT  
BARRIS, SOTT, DENN & DRIKER

**APPENDIX F**

**“(H) Filing and Service of Discovery Materials.**

(I) Unless a particular rule requires filing of discovery materials, requests, responses, depositions, and other discovery materials may not be filed with the court except as follows:

(a) If discovery materials are to be used in connection with a motion, they must either be filed separately or be attached to the motion or an accompanying affidavit;

(b) If discovery materials are to be used at trial they must be either filed or made an exhibit;

(c) The court may order discovery materials to be filed.”

**Michigan Court Rules Rule 2.302(H)(I)**